

1 UNITED STATES BANKRUPTCY COURT
 2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE
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 5 IN RE:)
 6 NORTHWEST TERRITORIAL MINT, LLC,)
 7 Debtor.) 16-11767-CMA
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9 MARK CALVERT, as Chapter 11 Trustee of)
 10 NORTHWEST TERRITORIAL MINT, LLC,)
 11 Plaintiff,)
 12 v.) A16-01217-CMA
 13 DIANE ERDMANN, an individual,)
 14 Defendant.)
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16 PARTIAL TRANSCRIPT OF THE DIGITALLY RECORDED PROCEEDINGS
 17 BEFORE THE HONORABLE CHRISTOPHER M. ALSTON
 18 DECEMBER 1, 2016
 19 (RULING ONLY)
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 25 PREPARED BY: SHARI L. WHEELER, CCR NO. 2396

A P P E A R A N C E S

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1 SEATTLE, WASHINGTON; DECEMBER 1, 2016

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3 (Other proceedings took place.)

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5 THE COURT: Let me go through, specifically, the
6 issues I have here.

7 There are no factual allegations to support the
8 general conclusion that the Erdmann transfers were made with
9 the actual intent to hinder, delay, or defraud creditors.

10 You need to allege facts with particularity as
11 to every single one of the transfers that could lead a trier
12 of fact to find that that was the actual intent. The
13 requirement necessarily means that the trustee must identify
14 each transfer he seeks to avoid.

15 You identified three badges of fraud, but two of
16 them are badges relating to the elements of constructive
17 fraud. I will note, in a moment, why those are not
18 sufficient. But as the Brown Medical Center case -- 552 B.R.
19 165 (S.D. Texas 2016) -- noted, pleading the existence of just
20 these two badges is not sufficient to plead actual fraud. And
21 while the complaint does allege that Ms. Erdmann is the de
22 facto wife of the owner of the Mint, the complaint does not
23 actually allege that she is an insider. Nor does the
24 complaint actually connect the alleged insider status to the
25 allegation that every transfer was done with an intent to

1 defraud creditors.

2 With respect to the constructive fraud issues,
3 Iqbal and Twombly -- and I won't go through all that. It's
4 identified, and the parties are well aware of that. They
5 require the plaintiff to allege facts from which a trier of
6 fact could find that each of the elements is present.

7 The complaint alleges that the Mint did not
8 receive value in exchange for the Erdmann transfers, but there
9 are no factual allegations that would support that contention.

10 The same thing with the allegation that the Mint
11 was insolvent at the time it made each transfer, or that the
12 Mint was engaged in or about to be engaged in a business or
13 transaction for which the property remaining in its hands was
14 unreasonably small. No factual allegations.

15 The allegation that the Mint incurred, was
16 intending to incur, or believed it would incur debts beyond
17 its ability to pay at the time of each transfer. Again, no
18 factual allegations.

19 So both the actual fraudulent transfer claim and
20 the constructive fraudulent transfer claim are not
21 sufficiently pled.

22 I do agree with the trustee, that the golden
23 creditor -- that is what you need to prevail under the strong
24 arm powers of Section 544 -- does not need to be named in the
25 complaint. While there's nothing binding in this circuit, I

1 believe the cases that do rule on that, including In re Image
2 Worldwide, 139 F.3d 574 (7th Cir. 1998), provide that the
3 trustee need not name the creditor, so long as the unsecured
4 creditor exists. And I know the trustee is aware of his
5 obligations under Bankruptcy Rule 9011 and is not going to
6 make the allegation unless he has a good-faith belief that
7 such creditor or creditors exist.

8 With respect to the third cause of action, for
9 unjust enrichment and restitution, this cause of action relies
10 on the allegation that at the time the Mint made the Erdmann
11 transfers, the Mint was engaged in or was about to engage in a
12 business or transaction for which the property remaining in
13 its hands, after each of the transfers, was unreasonably
14 small. As noted above, the recital of this element for a
15 constructive fraudulent transfer claim was made without any
16 supporting allegations. Thus, the third cause of action has
17 not been sufficiently pled.

18 The fourth cause of action is for constructive
19 trust. Again, really no factual allegations made. Just a
20 reliance on the prior factual allegations that are deficient.
21 So the fourth cause of action has not been sufficiently pled.

22 The fifth cause of action is for turnover.
23 Again, no factual allegations. Just a legal conclusion and a
24 statement of the desired remedy. The fifth cause of action is
25 not sufficiently pled.

1 I understand the trustee's position, that this
2 is a simple case and the defendant knows the nature of the
3 allegations against her. But the rules and the case law
4 require more in the complaint. The trustee needs to allege
5 facts that would support the claims asserted.

6 Now, I'm going to grant the motion, but the
7 dismissal is going to be without prejudice --

8 MR. NEU: Right.

9 THE COURT: -- not surprisingly. Clearly, the
10 trustee is going to get an opportunity to file an amended
11 complaint. And 21 days -- is that going to be sufficient?

12 MR. NEU: More than sufficient, Your Honor. I
13 think we can have it on file next week.

14 THE COURT: Okay. Let's move this along, then.
15 So next week is fine. I'll enter the order -- actually,
16 Ms. Scalia, if you could prepare an order that basically says
17 that the motion is granted, the complaint is dismissed without
18 prejudice, but the trustee is granted leave of 21 days to file
19 an amended complaint in this adversary proceeding. If the
20 trustee does not file and serve an amended complaint within
21 that time period, the defendant may submit an ex parte order
22 dismissing the lawsuit without prejudice.

23 It doesn't sound like that's going to happen.

24 MR. NEU: No. It will not happen, Your Honor.

25 THE COURT: All right. That's a long way of

1 saying that we're going to try this again.

2 All right. Thank you, Mr. Neu.

3 Thank you, Ms. Scalia.

4 MR. NEU: Thank you, Your Honor.

5 MS. SCALIA: Thank you, Your Honor.

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7 (The proceedings in this matter were concluded.)

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CERTIFICATE

I, Shari L. Wheeler, court reporter and court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter. Some editing changes may have been made at the request of the Court.

These pages constitute the original or a copy of the original transcript of the proceedings, to the best of my ability.

Signed and dated this 5th day of December, 2016.

by /s/ Shari L. Wheeler

SHARI L. WHEELER, CCR NO. 2396